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In The Supreme Court Of The United States

OCTOBER TERM, 1986

EASTERN CONNECTICUT CITIZENS ACTION GROUP, INC. ET AL.,
Petitioners,

v.

ELIZABETH H. DOLE, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
REASONS FOR DENIAL OF THE PETITION	3
CONCLUSION	6

TABLE OF AUTHORITIES

Cases:	Page(s)
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	3, 5
Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289 (1985)	4
Brown v. Ferro Corp., 763 F.2d 798 (6th Cir.), *cert. denied*, 106 S.Ct. 344 (1985)	3
Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164 (6th Cir. 1972)	5
National Wildlife Federation v. Goldschmidt, 677 F.2d 259 (2d Cir. 1982)	3
National Wildlife Federation v. Snow, 561 F.2d 227 (D.C. Cir. 1976)	4
United States v. Johnston, 268 U.S. 220 (1925)	3

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is now reported at 804 F.2d 804 (2d Cir. 1986).

STATEMENT OF THE CASE

In addition to the facts stated by the petitioners, the District Court also found that the necessary environmental impact statement and environmental assessment may have to be revised, or that the plans for the highway may have to be altered or even abandoned, as a result of the evaluations that the Army Corps of Engineers and the Connecticut Department of Environmental Protection must still undertake. Petitioners' Appendix (Pet. App.) at 7a–8a.

REASONS FOR DENIAL OF THE PETITION

1. The essence of the petitioner's claim is that the District Court, in deciding that the petitioner's request for injunctive relief was not ripe, improperly resolved the conflict between the government's interest in continuing to plan an eleven mile highway and the interest of homeowners in preventing the condemnation of their property as a result of the highway proposal. This claim does not merit a discretionary grant of certiorari. The precise balance to be struck between the two competing interests at stake is a matter best entrusted in the first instance to the District Court, since the District Court has the complete factual record before it and must make what is essentially a discretionary decision. *See Brown v. Ferro Corp.*, 763 F.2d 798, 801 (6th Cir.), *cert. denied*, 106 S.Ct. 344 (1985). Review by the Court of Appeals, moreover, provides a sufficient check against a District Court's abuse of discretion. *Id.* at 802.

The requirement in the Administrative Procedure Act that a party seeking to appeal an administrative decision await "final agency action" is one to be interpreted in a "pragmatic way." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In determining whether an appeal is premature and therefore subject to dismissal on ripeness grounds, it is the responsibility of the District Court to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* It is difficult in this context to "adopt . . . a mechanical rule" because the circumstances calling for early review "cannot be spelled out in exact detail." *National Wildlife Federation v. Goldschmidt*, 677 F.2d 259, 264 (2d Cir. 1982). In short, a case of this nature is invariably a fact-specific one with only limited precedential value for future cases. As such, it is one properly left to the lower federal courts and inappropriate for a grant of certiorari. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) (This Court does not "grant a certiorari to review evidence and discuss specific facts.").

2. The situation might differ if a per se rule existed, or should exist, that would prevent a District Court from dismissing on ripeness grounds a challenge, such as the one here,

under the National Environmental Policy Act (NEPA) by property owners to a proposed highway once property condemnation proceedings have begun. Neither precedent nor policy, however, supports such a rule.

Despite the petitioners' claim of a conflict in the decisional law, not one case cited by the petitioners stands for the proposition that a District Court must necessarily enjoin, due to alleged NEPA violations, the completion of a highway construction plan once the government has reached the stage at which it begins to acquire rights-of-way and to condemn property. The petitioners initially attempt to establish such a rule by quoting this Court's language in *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures,* 422 U.S. 289 (1975) *(SCRAP),* that "notions of finality and exhaustion do not stand in the way of judicial review [of a proposal subject to NEPA], even though other aspects of the [proposal] are not ripe for review." *Id.* at 319. But the petitioners have simply omitted the introductory phrase in this quotation which, when added, changes the whole meaning:

> *When agency or departmental consideration of environmental factors in connection with that "federal action" is complete,* notions of finality and exhaustion do not stand in the way of judicial review of the adequacy of such consideration, even though other aspects of [the proposal] are not ripe for review.

Id. (emphasis added). Thus in *SCRAP* this Court decided to review the Interstate Commerce Commission's evaluation of the environmental impact of new railroad freight rates on the theory that, although the rates were subject to further Commission consideration, their environmental impact was not. *Id.* at 316–19. The rule in *SCRAP* would quite clearly not apply when, as here, governmental agencies intend to conduct further environmental review.

The petitioners gain no greater support from the decisions of the lower federal courts that they cite. *National Wildlife Federation v. Snow,* 561 F.2d 227 (D.C. Cir. 1976), involved not an injunction against an actual highway project but rather an

injunction against an allegedly invalid federal regulation governing the number and timing of highway project public hearings. The question was strictly a legal one in which, unlike the situation here, further factual developments would make no difference. *Id.* at 236. The other cases cited by the petitioners merely acknowledge, at least implicitly, that the need for accurate environmental information and the possibility of bureaucratic inertia are important factors in deciding whether to enjoin a pending highway proposal that has reached the condemnation stage. They do not, however, go so far as to hold that these factors are dispositive. *See, e.g., Environmental Defense Fund v. Tennessee Valley Authority,* 468 F.2d 1164, 1183 (6th Cir. 1972) (district court considered irreparable harm to both parties and concluded that scales tipped in favor of plaintiff environmental groups and property owners).

The per se rule suggested by the petitioners would also make little sense as a matter of policy. However strong the force of bureaucratic inertia, that force is far from irreversible. The petitioners' per se rule would require a District Court to ignore the possibility, which may be very real in any given case, that government agencies will alter or abandon their proposal in light of subsequent evaluations. And the petitioners' proposal would present the very significant risk of disruption of the administrative process through piecemeal appeals. *See Abbott Laboratories v. Gardner,* 387 U.S. at 148–49. Only with the existing "pragmatic" finality doctrine, *id.* at 149, which treats no one factor as conclusive, will these important concerns receive due consideration.

3. Although the District Court quite properly did not deem the alleged hardship resulting from imminent condemnation proceedings as dispositive of the question of finality, it did—also quite properly—weigh this hardship into the balance of equities. The Court specifically recognized the "discomfort that a person may experience as a result of 'uncertainties' in his 'lifestyle' that may not be resolved for some months." Pet. App. at 9a. The Court merely declined to find this factor as weighty as the government's interest in continuing with the highway approval process. There is nothing inherently wrong about such a decision. The Court of Appeals has reviewed it and summarily affirmed. No basis exists for further review.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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